Contractor Services, Inc. and International Brotherhood of Electrical Workers, AFL-CIO, Local 347. Cases 10-CA-28856, 10-CA-29123 (Formerly 15-CA-13683), and 10-CA-29174 (Formerly 18-CA-13875)

September 27, 2007

SUPPLEMENTAL DECISION AND ORDER BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND KIRSANOW

On April 24, 2002, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The General Counsel filed exceptions and a supporting brief, to which the Respondent filed an answering brief. The Respondent filed exceptions and a supporting brief, to which the General Counsel filed an answering brief. The Respondent also filed a reply brief to the General Counsel's answering brief. Additionally, two amici curiae, Associated Builders and Contractors, Inc. (ABC) and the International Brotherhood of Electrical Workers (IBEW), filed briefs. The General Counsel filed an answering brief responding to ABC's brief. The Respondent filed an answering brief responding to IBEW's brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

1. On May 31, 2007, the Board issued its decision in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB 1348. *Oil Capitol* requires the General Counsel, as part of his burden of proving a reasonable gross backpay amount due, to present affirmative evidence that a union salt who was discriminated against, if hired, would have worked for the employer for the backpay period claimed in the General Counsel's compliance specification.

The judge found that discriminatee William H. Hunt Sr., a volunteer union organizer, was a "salt." Accordingly, we shall remand this case to the judge for further consideration of Hunt's backpay in light of *Oil Capitol*, including allowing the parties to file briefs on the issue, and, if warranted, reopening the record to present evidence relevant to deciding the case under the *Oil Capitol* framework.²

2. Although discriminatee Tracy Landers, a paid union organizer, also was a salt, his backpay entitlement is not encompassed by our remand. Wholly apart from the issues addressed in *Oil Capitol* concerning the length of the backpay period for salts, we find that the General Counsel failed to show that his gross backpay calculation was reasonable as to Landers. We further find, in agreement with the judge, that Landers did not exercise reasonable diligence in searching for interim employment during his backpay period. Accordingly, we find that Landers is entitled to no backpay because of his failure to mitigate.³

Factual Background

The Respondent is a temporary job referral agency, based in Davenport, Iowa, that refers construction trades workers to jobsites around the country, mostly in the Midwestern states, with a majority of those referrals to jobsites in Iowa. The Respondent accepts applications from potential employees, or "candidates," and lists in its job referral database their names and contact information, along with their qualifications, skills, work history and previous employers, and travel limitations. When a contractor hires the Respondent to provide construction trades workers at a jobsite, the Respondent searches its database to locate candidates who best match the contractor's employment needs, and then refers those candidates to the contractor.

The Respondent's owner, Christine Arnold, testified that a candidate's residence and willingness to travel are important criteria used by the Respondent to select candidates for referral. Only candidates residing within 75 miles of the job are referred to "locals only" jobs—those where the contractor does not pay a per diem allowance for travel. The Respondent will refer out-of-town candidates to those jobs that do offer a per diem allowance. The Respondent generally prefers to refer candidates who indicate a willingness to travel to these "per diem" jobs, but has opened up those jobs to candidates who have not indicated a willingness to travel when necessary to fill them.

Both Landers and Hunt submitted applications to the Respondent in the fall of 1995. In response to their applications, the Respondent mailed them a form that required them to obtain "authorization" from the Union and an affirmation that they were not being "subsidized" by the Union before they could be listed in the database. The Respondent subsequently refused to list Landers and Hunt because neither of them returned the form. On No-

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties and the amici curiae.

² There were no exceptions to the judge's analysis and findings regarding Hunt's mitigation efforts.

³ Discriminatee Timothy Stolp's interim earnings exceeded the General Counsel's gross backpay determination, and it is undisputed that he is owed no backpay.

vember 8, 1997, the Board found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to list Landers and Hunt in its job referral database because of their union activities, and ordered the Respondent to offer them employment and make them whole for losses caused by the discrimination. *Contractor Services*, 324 NLRB 1254 (1997).⁴ In an unpublished order, the United States Court of Appeals for the Eleventh Circuit enforced the Board's Order. *Contractor Services v. NLRB*, No. 00-10668 (11th Cir. 2000).

Landers is a professional union organizer and a fulltime employee of the Union. He testified that he worked as a journeyman electrician from 1992 to 1994, when he became a paid organizer for the Union. As an organizer, Landers searched only for jobs with nonunion employers that presented organizing opportunities. When he contacted these employers, he "was basically just trying to get information to find out who was doing what, compile the information and then round up my army and go." He did not attempt to secure employment with contractors from out of the area for short-term jobs because "by the time you get out if you do anything the job is over." He would sometimes apply for work with local contractors on short jobs, depending on who it was "and if we had any kind of activity going on with that particular contractor in the past."

The General Counsel alleged that Landers' backpay period began on September 21, 1995, when he applied with the Respondent, and ended approximately 46 months later when he accepted a position as the Union's business agent in July 1999. During the backpay period, Landers looked for nonunion jobs in newspaper advertisements, daily bid reports, and state agency job listing services, and also solicited job tips from fellow union members and local contractors. Through those efforts, Landers contacted approximately 36 nonunion employers in the geographic jurisdiction of the Union⁵ on at least 41 occasions during the backpay period, although he applied for work with only 23 of them.⁶

On his application with the Respondent, Landers indicated that he lived in Wetumpka, Alabama, and was willing to travel—but only within the 24-county geographic jurisdiction of the Union. During the backpay period, Landers worked as an electrician with another employer located in Dothan, Alabama, pursuant to a settlement of a refusal-to-hire unfair labor practice charge against that employer. Landers quit that job after only 2 days because, according to Landers, "[t]here was no way [he] could do any organizing" there. Landers also received backpay from three nonunion employers during the backpay period, in settlement of refusal-to-hire unfair labor practice charges against those employers. Other than these settlement proceeds and his 2 days of wages, Landers had no interim earnings during the backpay period

Hunt was a journeyman electrician and volunteer union organizer. The General Counsel alleges that his backpay period began on November 21, 1995, when he applied with the Respondent, and ended approximately 5 years later when he turned down the Respondent's referral to a job in Phoenix, Arizona, in December 2000. On his application with the Respondent, Hunt wrote that he was willing to travel without limitation from his home in Cowarts, Alabama. Consistent with that statement, Hunt testified that he ordinarily looked for work by signing up with union hiring halls, and had previously registered with hiring halls in Tennessee, Georgia, Alabama, West Virginia, and Utah. Prior to the backpay period, Hunt obtained work through those efforts in Chattanooga, Tennessee, and Augusta and Albany, Georgia. During the backpay period, Hunt followed his regular practice and registered with hiring halls in Montgomery, Alabama, and Augusta and Albany, Georgia. Hunt also registered with the state employment agency and applied for jobs directly with contractors. Through these efforts he obtained interim employment as far away as Pensacola, Florida, and Marcum, Alabama, both about 125–150 miles from his home. Hunt also testified that he would have accepted a job referral from the Respondent to any state or city during the backpay period, although his preference was "to work closer to home instead of farther away from home."

During Landers' and Hunt's respective backpay periods, the Respondent referred numerous candidates to jobsites throughout the country. Although some referrals were to jobsites located in the Southeastern states, there is no evidence that any were to jobsites within the Union's geographic jurisdiction.

⁴ Concurring, former Member Higgins relied solely on the fact that the Respondent asked the applicants whether they were being subsidized by the Union. In Member Higgins' view, an employer "in the business of supplying employees to other employers may legitimately seek assurances . . . that their union will not object to their working for nonunion employers." 324 NLRB at 1256.

⁵ The geographic jurisdiction of the Union encompasses 24 counties in Alabama.

⁶ Landers documented or specifically testified that he made the following number of applications for employment during each quarter of the backpay period: 1995 3Q (0); 1995 4Q (3); 1996 1Q (3); 1996 2Q (0); 1996 3Q (3); 1996 4Q (1); 1997 1Q (0); 1997 2Q (0); 1997 3Q (3); 1997 4Q (1); 1998 1Q (3); 1998 2Q (3); 1998 3Q (0); 1998 4Q (1); 1999 1Q (2); 1999 2 Q (0); 1999 3Q (0).

⁷ Hunt did not accept the referral because he was already working for an employer closer to his home.

Discussion

The Region's compliance specification estimated the gross backpay due to Landers and Hunt by using the "comparable employee" method. Based on Landers' and Hunt's assurances to the Region's compliance officer that they would have accepted job referrals from the Respondent at any location for any duration, the compliance specification averaged the quarterly earnings of 12 allegedly comparable employees who had worked for the Respondent most regularly in consecutive years to estimate what Landers and Hunt would have earned absent the Respondent's unlawful discrimination. The compliance specification also offset Landers' and Hunt's interim earnings during the backpay period against the gross backpay determination for each of them. Based on this methodology, the compliance specification sought backpay of \$80,389.05 plus interest for Landers and \$11,738.03 plus interest for Hunt.

As to Hunt, the judge specifically found that the backpay specification utilized by the General Counsel to determine his gross backpay was reasonable, and that Hunt exercised reasonable diligence in seeking interim employment through union hiring halls during the backpay period. He therefore concluded that Hunt was entitled to backpay as set out in the compliance specification.

The judge made no findings concerning the gross backpay figure for Landers. Instead, he found that Landers incurred a willful loss of earnings because he "completely disregarded any opportunities to obtain work through out of work lists in the hiring hall of his own local union and of local unions in other jurisdictions." The judge further found that Landers apparently was satisfied with the pay he received from the Union as a paid union organizer, supplemented by awards from other discrimination cases. In these circumstances, the judge concluded that the amount of backpay sought by the General Counsel would be punitive and would represent an unwarranted windfall for Landers. For these reasons, the judge found that Landers was not entitled to backpay as set out in the compliance specification.

Although the judge found that Landers failed to mitigate his damages, he went on to find that, because it was "axiomatic that some backpay is owing to Landers," a reasonable amount of backpay for Landers was the same amount of backpay due to Hunt. The judge accordingly found that both Landers and Hunt were entitled to backpay in the amount of \$11,738.03 plus interest.

A. Gross Backpay

The purpose of backpay is remedial and not to punish the respondent. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940). Neither should backpay unjustly enrich the

discriminatee by placing him in a better position than he would have enjoyed if the discrimination had not occurred. Master Appliance Corp., 164 NLRB 1189, 1190 (1967); Taracorp Inc., 273 NLRB 221, 223 (1984). Accordingly, in a compliance proceeding, the Board attempts to reconstruct as nearly as possible the economic life of the discriminatee and place him in the same financial condition he would have enjoyed in the absence of the unlawful discrimination. Cobb Mechanical Contractors, 333 NLRB 1168 (2001), enfd. in part, remanded in part 295 F.3d 1370 (D.C. Cir. 2002); NLRB Case Handling Manual (Part Three) Compliance Section 10540.1 (formerly Section 10532.1) ("The objective in determining gross backpay is to reconstruct as accurately as possible what employment and earnings the discriminatee would have had during the backpay period, had there not been an unlawful action."); see generally Performance Friction Corp., 335 NLRB 1117 (2001).

The comparable or representative employee approach is an accepted methodology for computing backpay. See Performance Friction, supra. Its application, however, is premised on a showing that the work, earnings, and other conditions of employment of the allegedly representative employees were, in fact, comparable to those of the discriminatee both before and after the unlawful action. NLRB Case Handling Manual (Part Three) Compliance Section 10540.3. Consistent with these principles, "the representative employee formula may not be employed unless it is representative of "the discriminatee. NLRB v. Ironworkers Local 378, 532 F.2d 1241, 1243-1244 (9th Cir. 1976) (rejecting compliance specification that treated discriminatee as comparable to elite group of steadily employed ironworkers absent sufficient justification), on remand 227 NLRB 692 (1977), supplemented by 262 NLRB 421 (1982). When the employment of the work force as a whole is "intermittent, the fact of intermittency must be taken into account unless there is something in the record which justifies a finding that, for some reason, the employee involved would not have been affected by the fluctuations that affected the group as a whole." Id. at 1244. It is the General Counsel's burden to establish gross backpay amounts that are reasonable, not arbitrary. Parts Depot, Inc., 348 NLRB 152, 153 (2006).

As shown above, the Respondent's employees are employed intermittently based on the availability of referrals from the Respondent and the employee's willingness to accept them. The allegedly comparable employees, however, were those who worked most consistently for the Respondent during the backpay period. We find that the General Counsel has failed to establish that these

individuals were "representative of" Landers. NLRB v. Ironworkers Local 378, supra.

There is no evidence that the allegedly comparable employees placed any limits on the referrals they would accept. A number of them accepted referrals to jobs in multiple states.⁸ Those jobs ranged in duration from 1 day to a month or more and included jobs in Kansas, Iowa, Texas, Colorado, and Nebraska. Landers, in contrast, stated on his application with the Respondent that he was willing to travel only within the Union's geographic jurisdiction in Alabama. His responsibilities to the Union and his personal circumstances also indicate that he would not have traveled to distant jobs. 10 As discussed more fully below, Landers neither looked for nor accepted any employment outside of the Union's geographic jurisdiction. He would not even accept instatement as part of a settlement agreement with an employer in Georgia—because that was not an area he "was interested in." He also was not interested in working for contractors from out of the area for short-term jobs.

We recognize that Landers told the Region's compliance officer that he would have accepted any job referrals from the Respondent and repeated this claim in his testimony as well. But the judge made no credibility findings concerning this self-serving and uncorroborated testimony, which is inconsistent with the record as a whole. In these circumstances, this testimony is insufficient to meet the General Counsel's burden of proof.

The General Counsel thus has failed to prove that Landers would have accepted referrals outside of the Union's geographic jurisdiction, especially where the job was of short duration. And there is no evidence that the Respondent referred any candidates to jobsites within the Union's geographic jurisdiction during the backpay period. The allegedly comparable employees, who ac-

cepted referrals outside of the Union's geographic jurisdiction including short-term jobs, therefore were not "representative of" Landers. *NLRB v. Ironworkers Local* 378, supra, 532 F.2d at 1244. As such, the General Counsel has not established that the gross backpay amount in the compliance specification for Landers is reasonable and not arbitrary.¹¹

B. Mitigation of Backpay

Once the General Counsel has shown that his gross backpay determination is reasonable, an employer may mitigate its backpay liability by showing that the backpay claimant did not make a reasonably diligent effort to obtain substantially equivalent employment during the backpay period. Millennium Maintenance & Electrical Contracting, Inc., 344 NLRB 516, 517 (2005); Glenn's Trucking, 344 NLRB 377, 377 (2005). The Board's requirement that a discriminatee attempt to mitigate his loss of earnings furthers the public policy of "promoting production and employment" on the part of the discriminatee and discourages the discriminatee from remaining idly unemployed. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 200 (1941). Although his search efforts need not be successful, the discriminatee must make an honest, good-faith effort to find interim work. Chem Fab Corp., 275 NLRB 21 (1985), enfd. mem. 774 F.2d 1169 (8th Cir. 1985); see also St. Barnabas Hospital, 346 NLRB 731, 732 (2006). A good-faith search for work requires "conduct consistent with an inclination to work and to be self-supporting and [] such inclination is best evidenced . . . by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment." Flannery Motors, Inc., 330 NLRB 994, 996 (2000) (internal quotation omitted). Under current Board law, these principles apply with equal force in the "salting" context where the discriminatee is a professional union organizer. Ferguson Electric, 330 NLRB 514, 518 (2000), enfd. 242 F.3d 426 (2d Cir. 2001).

The General Counsel has excepted to the judge's analysis of Landers' mitigation efforts and his finding that Landers unreasonably failed to mitigate his loss of earnings during the backpay period.¹² The General

⁸ The General Counsel presented no evidence concerning the referrals accepted by the allegedly comparable employees. The Respondent showed that 6 of them were referred to jobs in 11 different states, all located a considerable distance from the Union's geographic jurisdiction: Neal Arensdorf (Iowa, Kansas, Wisconsin); Ronald Atwood (Kansas, Texas, Tennessee, Missouri); Jamall Beard (Colorado, Iowa, Kansas); Robert Bonwell (Iowa, Michigan, Kansas, South Carolina, Missouri); Brad Theophilus (Nebraska, Iowa); and Martin Wilkins (Iowa, Wisconsin, Indiana, Texas, Kansas). There is no evidence concerning the states in which the other allegedly comparable employees worked.

⁹ There is no evidence that Landers informed the Respondent, after applying, that his willingness to accept referrals differed from what he had indicated on his application.

¹⁰ Landers admitted that he was an instructor in the Union's apprenticeship program, which required him to be home on many weekends. He also testified that he had a wife and minor child at home and that, for that reason, "it was important" for him to be home. It was also important for him to be "around" and "accessible" in order to perform his duties as a union organizer.

¹¹ Unlike Landers, Hunt did not restrict his willingness to accept job referrals when he applied with the Respondent, and he indicated on his application that he was willing to travel without limitation. Consistent with his application, Hunt sought and obtained work at locations distant from his home when work "closer to home" was not available. We therefore agree with the judge's implicit finding that the General Counsel established that the allegedly comparable employees were representative of Hunt's circumstances, as the compliance specification alleges.

¹² Amicus ABC contends that the judge properly reduced Landers' backpay award, arguing that Landers failed to reasonably mitigate his loss of earnings by limiting his job search to nonunion employers.

Counsel argues that, under the Board's current mitigation analysis for professional union organizer-discriminatees, Landers satisfied his duty to mitigate his loss of earnings by following his regular method of searching for work. Having done so, Landers was not obligated to expand the scope of his search to include union employers, even after he found no success with nonunion employers.¹³

We have previously found that the gross backpay amount advanced by the General Counsel is unreasonable as to Landers because the formula applied to him was not appropriate. Further, even had the General Counsel established an appropriate backpay formula as to Landers, and a resultant gross backpay figure, we agree with the judge that, for the reasons in his decision and those below, Landers unreasonably failed to mitigate his loss of earnings during the backpay period, and is not entitled to backpay.

In *Ferguson Electric*, supra, the Board considered whether a professional union organizer-discriminatee reasonably mitigated his loss of earnings by searching for work only with nonunion employers that the union had targeted for organizing. Id. at 518. The Board rejected the employer's argument for a per se rule that a failure to mitigate damages will be found in any case where the union placed limitations on the universe of employers to whom a paid organizer could apply for work. The Board reasoned that "[b]y propounding its bare argument, without supporting facts or evidence, the [employer] [] failed to satisfy its burden." Id. at 518. The Board also made clear, however, that if the record had shown that the organizer failed to make a good-faith effort to follow his usual method of seeking employment, "4 the union's poli-

ABC also argues that the Union's restriction on Landers' job search was unreasonable because Landers actually worked only 2 days as an electrician during the backpay period. ABC additionally urges the Board to revisit the appropriate mitigation analysis for professional organizer-discriminatees.

Amicus IBEW argues that the Board has consistently applied the same mitigation analysis for professional union organizers applicable to other discriminatees, and that there is no need to revisit the Board's current mitigation doctrine. IBEW also argues that the judge's decision as to Landers' mitigation efforts is inconsistent with current Board law and that Landers conducted a reasonably diligent search for interim employment.

The General Counsel and the IBEW also argue that the judge's decision to award Landers the same backpay as awarded to Hunt lacks a rational basis in the facts because Hunt's efforts to secure interim employment were necessarily different from those of Landers, a professional union organizer. Given our finding that Landers is entitled to no backpay, it is not necessary to address this argument.

¹⁴ In *Ferguson Electric*, the parties stipulated that the organizer's regular method of obtaining work was to seek employment with nonunion employers in furtherance of the union's organizing goals. Id. at 518

cies unreasonably limited the organizer's job search, ¹⁵ or the organizer otherwise unreasonably failed to mitigate his loss of earnings, that evidence "would favor our finding merit in the [employer's] contentions." Id. at 519. ¹⁶

Applying these principles, we find that Landers unreasonably failed to mitigate his loss of earnings during the backpay period. As noted above, the Union limited Landers' job search to nonunion employers. In addition, Landers did not seek employment on many short duration jobs because they did not offer any substantial organizing opportunity.¹⁷ Unlike in Ferguson Electric, the Respondent does not rely on the mere fact of unionimposed limitations. Rather, it is apparent that these limitations unreasonably limited Landers' search inasmuch as Hunt and Stolp, who were not subject to these limitations, successfully obtained substantial interim employment. Indeed, Stolp earned more during the backpay period from his interim employment than he would have earned by working for the Respondent. Hunt also substantially mitigated his backpay by obtaining work with union employers through the hiring hall. By focusing his search exclusively on nonunion employers as required by the Union, and by ignoring nonunion jobs of short duration, Landers willfully ignored substantially equivalent employment opportunities during the backpay period. Knickerbocker Plastic Co., 132 NLRB 1209, 1219 (1961) (recognizing that it is incumbent on a claimant to seek a job for which he has extensive experience); see also Heinrich Motors, 166 NLRB 783, 791–792 (1967), enfd. 403 F.2d 145 (2d Cir. 1968) (finding that auto mechanic-discriminatee incurred willful loss of earnings by applying for work only at gas stations and refusing to apply for substantially equivalent work at car dealerships).

Second, we agree with the judge that Landers should have broadened the scope of his search efforts to include union employers after discovering that work with nonunion employers was not readily available to him. *NLRB v*.

¹⁵ In *Aneco*, 333 NLRB 691, 692 fn. 3 (2001), enfd. in relevant part 285 F.3d 326 (4th Cir. 2002), the Board confirmed that it will not always be found reasonable for a discriminatee engaged in organizing activities to conduct an interim job search within the limitations imposed on his search by the union.

¹⁶ The Second Circuit enforced the Board's decision in *Ferguson Electric* because the record was silent as to the actual scope of the organizer's job search or the actual number of employers included in that search. 242 F.3d at 435–436. The Court reasoned that it would be inappropriate to presume that the organizer failed to make reasonable efforts to mitigate damages. Id. Thus, "[a]s a result of [the employer's] failure to introduce evidence in support of its argument that [the organizer] did not make reasonable attempts to mitigate damages, [it] remains liable . . . for the entire backpay award." Id.

¹⁷ Moreover, Landers quit work with a nonunion employer after just 2 days because he could not do any organizing.

Madison Courier, Inc., 505 F.2d 391, 402 (D.C. Cir. 1974) ("[W]hen it became apparent that [substantially equivalent jobs] were not available . . . , the claimants should have broadened the scope of their search."). Landers' job search eschewed a common and accessible source of replacement employment opportunities, the hiring hall. Thus, once it was apparent that the pool of nonunion employers in the Union's jurisdiction was not a viable source of replacement employment, Landers should have turned to the hiring hall in his effort to mitigate his loss of earnings. This Landers failed to do. Indeed, he did not even expand his search to include all nonunion short-duration jobs.

We recognize that the limited scope of Landers' interim job search was in keeping with his duty to his Union employer to seek jobs that presented opportunities for organizing. In saying that Landers should have broadened his job search, we do not mean to suggest that Landers should have abrogated his duties to his union employer. Our point is simply that where an organizerdiscriminatee's loyalty to his union employer results in an unreasonably limited job search, that individual cannot avoid the usual consequences of such an insufficient search, i.e., a loss of backpay. In plain terms, Landers cannot have his cake and eat it, too. We recognize that under Ferguson Electric, the mere fact of union-imposed limits on a job search, without more, does not meet an employer's burden to show failure to mitigate. As explained above, however, Ferguson Electric does not preclude finding a failure to mitigate where union-imposed limits resulted in an unreasonably limited job search. That is the case here, as the contrasting interim employment records of Hunt and Stolp make abundantly clear.

We also observe that, during the backpay period, and despite his ongoing failure to obtain interim employment, Landers contacted, on average, less than one employer per month and actually applied with only 23 employers during the approximately 46-month backpay period. In 7 quarters of the backpay period, Landers made no applications for work at all. We need not decide here whether the number of applications Landers submitted, standing alone, establish a failure to mitigate his loss of earnings. Taken together with the other evidence cited above, however, his haphazard efforts support our finding that Landers failed to search for interim employment with the requisite diligence.

In sum, for the reasons stated above, we find that Landers failed to make "an honest and good-faith effort" to obtain interim employment. *Chem Fab*, supra, 275 NLRB at 21.

ORDER

IT IS ORDERED that this proceeding is remanded to the administrative law judge for appropriate action as noted above.

IT IS FURTHER ORDERED that the administrative law judge shall prepare a second supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the second supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Lauren Rich, Esq., for the General Counsel.

Arthur W. Eggers, Esq. and James S. Zmuda, Esq. for the Respondent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This backpay case was heard before me in Atlanta, Georgia, on December 3 and 4, 2001. On November 8, 1997, the National Labor Relations Board (the Board) issued its Decision and Order in this case finding that Respondent Contractor Services, Inc. (Respondent) had violated Section 8(a)(1) and (3) of the Act by failing and refusing to consider for hire and to hire employees Tracy Landers, William Hunt Sr., and Timothy S. Stolp who were open union salts attempting to organize Respondent's employees on behalf of International Brotherhood of Electrical Workers, AFL-CIO, Local 397 (Union) and requiring Respondent to offer employment to and make these employees whole for the losses sustained by them as a result of Respondent's unlawful discrimination against them. The Board's decision was enforced by the Order of the United States Court of Appeals for the Eleventh Circuit entered on August 2, 2000. The parties having been unable to agree to the appropriate amount of backpay, if any, due the employees, the Regional Director for Region 10, on behalf of General Counsel issued the compliance specification and notice of hearing on August 1, 2001. Stolp's interim earnings exceeded his gross backpay and the General Counsel does not seek backpay on his behalf.

The issues as framed by the backpay specification and Respondent's answer are whether Respondent must pay Tracy Landers the sum of \$80,389.05, plus interest, and William H. Hunt Sr. the sum of \$11,738.03, plus interest.

The General Counsel contends that the compliance officer reasonably approximated the backpay owed as a result of the discrimination against Landers and Hunt. The General Counsel contends that Respondent is gambling "all or nothing" that the discriminatees are entitled to NO backpay. She contends that Respondent does not dispute the method or formula used to calculate backpay nor the actual calculations of backpay. She notes that Respondent does not propose any alternative amount or method of calculating backpay other than zero. She contends that Respondent is therefore barred from making any arguments now pursuant to Section 102.56(b) of the Board's Rules and Regulations which required Respondent in its answer

to set forth all "the applicable premises and furnish[ing] the appropriate supporting figures." She contends that Respondent should not now be permitted to argue any alternative theory not alleged in its answer pursuant to Section 102.56(b).

Respondent operates a temporary employment service and refers employees of several construction trades to construction jobs throughout the United States and maintains a list of various skilled employees for referral such as electricians, plumbers, pipefitters and carpenters and was found in the underlying unfair labor practice case to have failed and refused to consider for hire and to hire the discriminatees for employment at various jobsites throughout the United States. Employees file applications with Respondent listing their skills and work history and willingness to travel or restrictions on travel. In the instant case Landers and Hunt each indicated they were willing to travel. Based on their applications and on the assurances of Landers and Hunt, the Region's compliance officer, Diane Williams, testified she utilized the "comparable or representative employee method" to calculate gross backpay which is an accepted methodology and is appropriate in this case. See Performance Friction Corp., 335 NLRB 1117 (2001). In the first step, Williams identified employees whose earnings were comparable to or representative of the gross backpay amounts Hunt and Landers would have earned had Respondent not discriminated against them. In step two of the process she tracked the gross backpay earned by each of the comparable or representative parties during the backpay period. In step three, she averaged the groups' earnings by quarter, to project the gross backpay Hunt and Landers would have earned in each guarter in the absence of Respondent's discrimination. In the next step she deducted (on a quarter-by-quarter basis) the discriminatees' interim earnings from gross backpay, to reach the net backpay due for each calendar quarter. In the final step she totaled the quarterly amounts due to reach the total amount of net backpay due.

Compliance Officer Diane Williams testified that she relied on the discriminatees' statements that they would have accepted any job offered by Respondent at any location and for any duration. Based on these assurances she concluded that they would have worked regularly for Respondent over consecutive years with substantial earnings in each year. She utilized the records supplied to her by Respondent and developed "profiles of 231 employees who worked for Respondent during the backpay period." She selected 12 employees as a representative group who had worked most regularly for consecutive years. The records disclose that of the 12 employees, 7 had worked 4 consecutive years and 5 had worked 3 consecutive years. The compliance officer reasoned that because Hunt and Landers were union salts they would have worked at distant locations because of their goals to organize employees.

The General Counsel contends that the Region was neither "unreasonable" nor "arbitrary" in relying on Hunt's and Landers' representations that they would have accepted work at any location during the backpay period. Respondent only initially made its first offer to Hunt and Landers of job assignments in Phoenix, Arizona, in December 2000. Neither Hunt nor Landers accepted the offer. Respondent relies on the rejections of this offer 5 years after the discrimination occurred as

support for its defense that the discriminatees were not diligently seeking work during the backpay period. This argument has no merit as the employees' actions in refusing a job 5 years later do not support the conclusion that the employees would not have accepted work during the backpay period. Moreover Landers' backpay period ended 1-1/2 years before Respondent's first offer for the Phoenix job when Landers became the Union's business manager and was no longer available for employment. Hunt was working closer to home at the time of the Phoenix offer of employment by Respondent and declined to accept the Phoenix job.

This case presents an anomaly wherein Landers testified that because of his position as a paid union organizer he did not seek electrical work through the Union's hiring hall or any other union's hiring hall as his primary goal was to organize unrepresented employees engaged in the electrical trade. Consequently he made inquires of and filed applications only with employers whose employees were unrepresented and openly held himself out as a salt. The General Counsel presented a list of three dozen nonunion employers who Landers contacted 41 times during the backpay period. He received no offers of employment with the nonunion employers and had virtually no interim earnings from engaging in the electrical trade with the exception of one occasion when he worked 2 days for a nonunion employer pursuant to a settlement of another unfair labor practice case in which he was an alleged discriminatee. He testified he quit this position on the second day as he was isolated from other employees and was threatened with discharge if he attempted to organize them. Respondent contends that Landers thus restricted his search for work to nonunion employers and did not seek work with union employers although he had the opportunity to do so and thus Landers did not engage in a good-faith diligent effort to find work and willfully incurred a loss of interim earnings during the backpay period in accordance with his primary goal as a paid organizer for the Union.

The General Counsel contends that Landers restriction of his search for work to nonunion employers was not a willful loss of earnings such as to forfeit his right to backpay. The General Counsel argues that Landers failure to obtain employment from nonunion employers "speaks volumes" about the discrimination practiced by nonunion employers who refuse to hire salts who have the dual purpose to obtain electrical work and to organize their nonunion work force. The Supreme Court in NLRB v. Town & Country Electric, 516 U.S. 85 (1995), recognized that salts may legitimately have a dual purpose in their search for work which is to both obtain work and to organize unrepresented employees in the work force. Thus, these employees are protected in their efforts to seek employment as salts under Section 7 of the Act, which gives employees the right to obtain work and to organize on behalf of unions and to seek union representation on behalf of unrepresented employees.

In *Aneco, Inc.*, 333 NLRB 691 (2001), petition for review granted in part and denied in part cross-petition granted in part and denied in part and remanded 285 F.3d 326 (4th Cir. 2002), the Board adopted the decision of the administrative law judge (ALJ) that the union organizer in that backpay case had exercised reasonable diligence in searching for work by following

his regular method of finding work. In the Aneco case as in the instant case involving Landers the union organizer did not apply for work at unionized employers or utilize the Union's hiring hall to obtain work as this did not further the dual purpose goal of organizing unorganized employees as well as obtaining work. However, the ALJ in the Aneco case also found that the paid union organizer's backpay during a 5-year period from 1993 to 1998, should be limited to 5 weeks since on April 1, 1998, the organizer accepted the Respondent's remedial job offer and commenced work for the Respondent, but 5 weeks later declared an unfair labor practice strike and ceased working. Contrary to the ALJ, the Board found that Respondent had not carried its evidentiary burden of showing how long the organizer in that case would have worked if the Respondent had hired him in 1993. The Board relied on Dean General Contractors, 285 NLRB 573, 573 (1987), that in compliance matters, "a wrong-doing employer bears the burden of proving that a discriminatee would not have remained at the same job which he was unlawfully denied." The Board stated that "this principle is the same for paid union organizers as for other employee discriminates," citing Ferguson Electric Co., 330 NLRB 514, 516 fn. 10 (2000), enfd. 242 F.3d 426 (2d Cir. 2001).

In *Knickerbocker Plastics Co.*, 132 NLRB 1209, 1219 (1961), the Board held that a discriminatee who had 12 years experience as a captain of waiters who did not apply for this type of job because he did not want it, had incurred a willful loss of earnings. The Board stated at 1219, "It is incumbent on a claimant to seek a job for which he has extensive experience." In the instant case before me Landers was a journeyman electrician with years of experience but willfully chose to ignore his opportunities to utilize his own union hall's referral systems and referral systems of other unions in the electrical trade.

In the instant case Landers was a paid union organizer who attempted to enhance his income by filing unfair labor practice charges against nonunion employers but completely disregarded any opportunities to obtain work through out of work lists in the hiring hall of his own local union and of local unions in other jurisdictions. Under these circumstances, I find that Landers did incur a willful loss of earnings during the backpay period of over 5 years and is not entitled to the amount of backpay set out in the compliance specification. Although the Act protects employees who serve as salts and may have a dual purpose to obtain work and to organize unrepresented employees, it does not support the proposition that discriminatees may restrict their opportunities to obtain interim employment by completely disregarding opportunities to obtain work through union hiring halls. Thus, a nonunion employer may be held to have violated the Act by refusing to hire a union salt because of his union affiliation and the employer may be ordered to make the salt whole for loss of earnings and benefits incurred as a result of the discrimination. However, the employee must engage in a reasonable search for work as recognized in Heinrich Motors, Inc., 166 NLRB 783 (1967), enfd. 403 F.2d 145 (2d Cir. 1968). I am aware of the Board's long standing rule that in compliance and backpay cases any doubts must be resolved against the wrongdoer. P*I*E Nationwide, 297 NLRB 454, 457 (1989). However, in the case before me I find there is no doubt but that Landers engaged in a willful loss of earnings in

this case by completely disregarding opportunities to obtain interim earnings by seeking employment with organized employers and through the use of union hiring halls including the hiring hall operated by his own local union. It is clear that Landers was seeking to treat the finding of a violation against the Respondent in this case as a windfall to which he was entitled without regard to any reasonable obligation on his part to seek interim employment. I find that the Act does not support such a conclusion. It provides for the redress of losses by employees and is remedial. The Act is not punitive.

I find that the backpay specification utilized by Compliance Officer Williams was reasonable under the circumstances and shall be adopted and followed in the case of discriminatee Hunt who sought and found work during the backpay period and had interim earnings offsetting the backpay. It is well established that the finding of discrimination having been practiced against an employee by an employer resulting in a loss of wages and benefits supports the conclusion that some backpay must be due and owing. NLRB v. Mastro Plastics Corp., 354 F.2d 176, 178 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966). In a backpay case the General Counsel must only submit the backpay specification and the Respondent must rebut it by demonstrating that it is incorrect, arbitrary, or unreasonable, Performance Friction Corp., supra. It is also well established that any uncertainty in a backpay case must be resolved against the wrongdoer whose unlawful actions created the uncertainty. P*I*E Nationwide, supra; Cobb Mechanical Contractors, 333 NLRB 1168 (2001). However, the Board also recognizes that an employee should not be compensated with backpay for willfully engaging in a loss of earnings. Ferguson Electric Co., 330 NLRB 514 (2000); Aneco, Inc., supra at fn. 3:

We affirm the judge's finding that Cox mitigated his loss through a reasonable job search in those quarters of the backpay period for which the General Counsel seeks backpay. We do not, however, rely on the judge's interpretation of Ferguson Electric to the extent that he suggested that it will always be reasonable for a paid union organizer engaged in "salting" activities to conduct an interim job search with limitations imposed by the organizer's union. On the contrary, the Board stated in Ferguson that a respondent could prove a willful loss of earnings if "the Union's policies unreasonably limited [the discriminatee's] job search." As in Ferguson, the Respondent here did not argue that any specific restrictions imposed by the Union on Cox's interim job search were unreasonable. Instead, the Respondent chose to argue that the mere existence of any union restrictions was per se unreasonable. The Board rejected this argument in Ferguson, and we reject it here as well.

In the instant case, I find that Landers engaged in a willful loss of employment by limiting his search for work to nonunion employers as an open salt where he was repeatedly rejected as an employee. He completely disregarded all opportunities for employment with unionized employers and failed to apply for work through union referral systems including his own local union. He apparently was satisfied with the pay he received from the Union as a paid union organizer supplemented by awards received from other discrimination cases. I find that the

award of backpay to Landers of the sum of \$80,389.05 sought by the General Counsel in this case would be punitive and would present an unwarranted windfall at odds with the purposes of the Act which is to make employees whole for loss of backpay caused by discrimination. Underlying the award of backpay as a make-whole remedy is the premise that an employee must actively seek work and may not be rewarded for engaging in a willful loss of earnings.

It is also axiomatic that an employee must engage in a goodfaith effort to find work and must broaden his area of search for work if none is to be found otherwise. In the instant case Landers completely ignored his opportunities for employment by failing to utilize union referral systems including his own local union in his own trade of electrical work as a source of employment. It is thus clear that his primary objective in his search for work was to organize nonunion employees.

In *Tualatin Electric, Inc.*, 253 F.3d 714, 718–719 (D.C. Cir. 2001), the court upheld the Board's determination in *Tualatin Electric*, 331 NLRB 36, 36–37 (2000), that the salts in that case had "satisf[ied] their obligation to mitigate damages because they followed their normal pattern of seeking employment through the Union's hiring hall, "citing *Ferguson Electric.*, 330 NLRB 514, 519 [(2000)], and *American Navigation Co.*, 268 NLRB 426, 427 (1983), where the Board held it was reasonable for employee searching for work in mitigation to adhere to job seeking patterns tradition[al] in the trade." However, in the

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instant case before me, Landers ignored the traditional manner of seeking work in the trade by failing to utilize union hiring halls where he clearly would have had opportunities to mitigate his damages as did Hunt. While Landers had the right to seek work only as an open salt with nonunion employers he was unable to obtain work through this method. He chose to ignore the traditional manner of obtaining work in his trade by utilizing union hiring halls for referral to work. Thus he did not satisfy his obligation to mitigate his damages.

ORDER

I accordingly conclude that Landers engaged in a willful loss of earnings and find that the backpay specification is excessive and should be disregarded with respect to Landers. However, I find that it is axiomatic that some backpay is owing to Landers. I find under these circumstances and limited to the facts of this case, that a reasonable calculation of backpay for Landers is the same amount of backpay due Hunt who engaged in a search for work and did not limit his opportunities for employment as did Landers. I thus conclude that Hunt and Landers should each receive backpay in the amount of \$11,738.03 as set forth in appendix A for Hunt. Said amounts shall be payable plus interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.

BACKPAY CALCULATION

CASE I	<i>VAME:</i>	Conti	ractor Service	es, Inc.						
CASE NUMBER:		10-CA-28856, et al.			BACKPAY PERIOD:			11/29/95–12/12/00 Appendix C*		
CLAIMANT:		William H. Hunt Sr.			INTEREST TO:			Jul 31, '01		
Year	Quarter	Gross Backpay	Interim Earnings	Interim Expenses	Net Interim Earnings	Net Backpay	Medical Expenses	Total Backpay	Interest	Total Due for Quarter
1995	4th	2,445.35			0.00	2,445.35		2,445.35	1,157.47	3,602.82
1996	1st	6,618.52	6,029.90		6,029.90	588.62		588.62	265.37	853.99
1996	2nd	6,618.52	6,029.90		6,029.90	588.62		588.62	253.60	842.22
1996	3rd	6,618.52	6,029.90		6,029.90	588.62		588.62	240.35	828.97
1996	4th	6,618.52	6,029.90		6,029.90	588.62		588.62	227.11	815.73
1997	1st	5,790.98	4,957.52		4,957.52	833.46		833.46	302.82	1,136.28
1997	2nd	5,790.98	4,957.52		4,957.52	833.46		833.46	284.07	1,117.83
1997	3rd	5,790.98	4,957.52		4,957.52	833.46		833.46	265.32	1,098.78
1997	4th	5,790.98	4,957.52		4,957.52	833.46		833.46	246.57	1,080.03
1998	1st	6,006.85	7,226.65		7,226.65	0.00		0.00	0.00	0.00
1998	2nd	6,006.85	7,226.65		7,226.65	0.00		0.00	0.00	0.00
1998	3rd	6,006.85	7,226.65		7,226.65	0.00		0.00	0.00	0.00
1998	4th	6,006.85	7,226.65		7,226.65	0.00		0.00	0.00	0.00
1999	1st	7,311.79	6,410.70		6,410.70	901.09		901.09	176.46	1,077.55
1999	2nd	7,311.79	6,410.70		6,410.70	901.09		901.09	158.44	1,059.53
1999	3rd	7,311.79	6,410.70		6,410.70	901.09		901.09	140.42	1,041.51
1999	4th	7,311.79	6,410.70		6,410.70	901.09		901.09	122.40	1,023.49
2000	1st	3,679.40	12,714.58		12,714.58	0.00		0.00	0.00	0.00
2000	2nd	3,679.40	12,714.58		12,714.58	0.00		0.00	0.00	0.00
2000	3rd	3,679.40	12,714.58		12,714.58	0.00		0.00	0.00	0.00
2000	4th	2,830.30	9,780.44		9,780.44	0.00		0.00	0.00	0.00
	Totals:					\$11,738.03	\$0.00	\$11,738.03	\$3,840.40	\$15,578.43

Total backpay due, including interest is: \$15,578.43

Notes:

Appendix A was designated as Appendix C to the compliance specification at the hearing.